

Tres Estrellas de Oro and Miguel Robles Perez. Case 21–CA–34837

November 15, 2002

DECISION AND ORDER

BY MEMBERS LIEBMAN, COWEN, AND BARTLETT

The General Counsel seeks summary judgment in this case on the ground that the Respondent has failed to file an answer to the complaint. Upon a charge and amended charges filed by Miguel Robles Perez on November 6, 2001, and February 7 and 28, 2002, respectively, the General Counsel issued the complaint on February 28, 2002, against Tres Estrellas de Oro, the Respondent, alleging that it has violated Section 8(a)(1), (3), and (4) of the Act. The Respondent failed to file an answer.

On April 1, 2002, the General Counsel filed a Motion for Summary Judgment with the Board. On April 5, 2002, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

Ruling on Motion for Summary Judgment

Sections 102.20 and 102.21 of the Board's Rules and Regulations provide that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the complaint affirmatively notes that unless an answer is filed within 14 days of service, all the allegations in the complaint will be considered admitted. Further, the undisputed allegations in the Motion for Summary Judgment disclose that the Region, by letter dated March 15, 2002, notified the Respondent that unless an answer was received by March 22, 2002, a Motion for Summary Judgment would be filed.

In the absence of good cause being shown for the failure to file a timely answer, we grant the General Counsel's Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a California corporation with offices and a principal place of business located at 2414 East Florence Avenue, Huntington Park, California, has been engaged in the business of providing bus transportation of passengers between Southern California and Mexico, with terminals located at 7228 Bayer Boulevard, San Ysidro, California, and at 103 Sixth Street, Los Angeles, California. During the 12-month period ending December 31, 2001, the Respondent, in

conducting its business operations described above, derived gross revenues in excess of \$500,000, and purchased and received at its facilities in Southern California, goods valued in excess of \$50,000 either directly from points outside the State of California, or from other enterprises located within the State of California, each of which other enterprises had received these goods directly from points outside the State of California.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that Wholesale Delivery Drivers, Salespersons, Industrial and Allied Workers, Local 848, International Brotherhood of Teamsters, AFL–CIO (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

On about November 10, 2000, employee Miguel Robles Perez went on leave from his position of employment at the Respondent after he incurred a work-related injury. On about October 31, 2001, employee Perez was given a complete medical release to return to work at the Respondent, effective November 5, 2001.

Since about November 6, 2001, the Respondent has failed and refused to return employee Perez to his position of employment at the Respondent.

The Respondent engaged in this conduct because Perez joined or assisted the Union and engaged in concerted activities; to discourage employees from engaging in these activities; and because Perez filed charges with the Board in Case 21–CA–33760 and gave testimony under the Act.

CONCLUSIONS OF LAW

1. By failing and refusing to return employee Perez to his former position, the Respondent has discriminated in regard to the hire or tenure or terms or conditions of employment of its employees, in violation of Section 8(a)(3) and (1) of the Act, and has discriminated against employees for filing charges or giving testimony under the Act, in violation of Section 8(a)(4) and (1) of the Act.

2. The Respondent's unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent has violated Section 8(a)(1), (3), and (4) by failing to return Miguel Robles Perez to his position of employment at the Respondent, we shall order the Respondent to offer Perez full reinstatement to

his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed. We also shall order the Respondent to make Perez whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, with backpay to be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).¹ Further, we shall require the Respondent to expunge from its files any reference to the unlawful discrimination against Perez, and to notify him in writing that this has been done and that the unlawful discrimination will not be used against him in any way. Finally, in accordance with the General Counsel's request and a prior Board case involving this Respondent, we shall order that the notice be posted in both English and Spanish. See *Tres Estrellas de Oro*, 329 NLRB 50 fn. 3 (1999).

ORDER

The National Labor Relations Board orders that the Respondent, Tres Estrellas de Oro, Huntington Park, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to return employees to their positions of employment after they receive medical clearance to return to work because they join or assist a union and engage in concerted activities.

(b) Failing and refusing to return employees to their positions of employment after they receive medical

clearance to return to work because they file charges with or give testimony to the National Labor Relations Board.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Miguel Robles Perez full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Perez whole for any loss of earnings and other benefits suffered as a result of the Respondent's unlawful failure and refusal to return Perez to his former position, with interest, in the manner set forth in the remedy section of this decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discrimination against Miguel Robles Perez, and within 3 days thereafter, notify him in writing that this has been done and that the unlawful discrimination will not be used against him in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Huntington Park, California, in both English and Spanish, copies of the attached notice marked "Appendix."² Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these

¹ In the complaint, the General Counsel seeks an order requiring the Respondent "to make employee Perez whole for any extra federal and/or state tax that would or may result from the lump-sum payment of a monetary award in this case." This aspect of the General Counsel's proposed Order would involve a change in Board law. See, e.g., *Hendrickson Bros.*, 272 NLRB 438, 440 (1985), *enfd.* 762 F.2d 990 (2d Cir. 1985). In light of this, Members Liebman and Bartlett believe that the appropriateness of this proposed remedy should be resolved after a full briefing by affected parties. See *Kloepfers Floor Covering, Inc.*, 330 NLRB 811 fn. 1 (2000). Because there has been no such briefing in this no-answer case, they decline to include this additional relief in the Order here. Members Liebman and Bartlett therefore find it unnecessary to pass on the issue raised by Member Cowen, i.e., whether the General Counsel has abandoned the complaint's request for the "tax remedy" in this case by failing to renew the request in the Motion for Summary Judgment.

Member Cowen does not believe that this novel "tax remedy" is presented to the Board in this proceeding. The General Counsel's Motion for Default Summary Judgment does not request this relief, and his failure to renew the complaint's request for this remedy is consistent with the General Counsel's position in his Motion for Summary Judgment in *Artesia Ready Mix Concrete*, 337 NLRB No. 93 (2002) (not reported in bound volume), where the General Counsel stated that he is not currently seeking this remedy before the Board.

² If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 6, 2001.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board had found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to return employees to their positions of employment after they receive medical

clearance to return to work because they join or assist a union and engaged in concerted activities.

WE WILL NOT fail and refuse to return employees to their positions of employment after they receive medical clearance to return to work because they file charges with or give testimony to the Board.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Miguel Robles Perez full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Miguel Robles Perez whole for any loss of earnings and other benefits suffered as a result of our unlawful failure and refusal to return him to his former position, with interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discrimination against Miguel Robles Perez, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the unlawful discrimination will not be used against him in any way.

TRES ESTRELLAS DE ORO